



An Coimisiún um
Rialáil Cumarsáide
Commission for
Communications Regulation

Market Review Further Update

Retail Access to the Public Telephone
Network at a Fixed Location for Residential
and Non-Residential Customers

Wholesale Fixed Access and Call
Origination

Information Notice

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An Coimisiún um Rialáil Cumarsáide
Commission for Communications Regulation

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1 Market Analysis Further Update

1.1 Background

- 1.1 In June 2021 the Commission for Communications Regulation (**ComReg**) issued an information notice (ComReg Document 21/65)¹ concerning its publication and parallel notification to relevant European authorities of a 'Draft Decision' concerning its analysis of the Retail Fixed Telephony Service (**RFTS**) and wholesale Fixed Access and Call Origination (**FACO**)² markets in Ireland. The notification was made on the basis of the draft measures set out in the Draft Decision attached at Appendix 1 of ComReg Document 21/65.
- 1.2 In the Draft Decision, ComReg proposed to de-regulate and remove all existing regulation in the RFTS markets and to partially de-regulate the FACO markets. The proposals in the Draft Decision meant that regulation would be maintained in the so-called 'Regional FACO Markets' only.
- 1.3 Prior to the adoption of a final decision, Article 32(3) of the European Electronic Communications Code (**EECC**)³ requires ComReg to publish and, at the same time, make draft measures accessible to the European Commission (**EC**), the Body of European Regulators for Electronic Communications (**BEREC**) and National Regulatory Authorities (**NRAs**) in other Member States (the '**Article 32 Notification**'). The Article 32 Notification was submitted by ComReg on 19 June 2021.
- 1.4 Under Article 32(3) of the EECC, the EC, BEREC and other NRAs have one month, to comment on ComReg's Article 32 Notification. Following its consideration, the EC can then issue a 'comments' or 'no comments' decision. A comments decision typically involves the EC expressing views on an NRA's draft measures and an NRA is obligated to take utmost account of them. ComReg and other NRAs are often, in the conduct of their market analyses, recipients of EC comments decisions.
- 1.5 However, under Article 32(4) of the EECC, for a draft measure which aims to:
 - (a) define a relevant market which is different from those defined in the recommendation referred to in Article 64(1); or

¹ Information Notice - Publication and notification to the European Commission (EC), the Body of European Regulators for Electronic Communications (BEREC), and Member State National Regulatory Authorities (NRAs) of draft measures under Article 32 of Directive 2018/1972, (**ComReg Document 21/65**), available at <https://www.comreg.ie/publication-download/information-notice-rfts-faco-draft-decision>.

² FACO, in general, is a wholesale line rental and call origination product enabling the provision of retail fixed line rental and call services to end users.

³ Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (the '**EECC**').

- (b) designate an undertaking as having, either individually or jointly with others, significant market power (**'SMP'**), under Article 67(3) or 67(4),

and where it would affect trade between Member States, the EC may by way of a letter containing comments express reservations about the proposed measure if the EC considers the draft measure would create a barrier to the internal market, or the EC has serious doubts as to its compatibility with Union law and, in particular, the objectives referred to in Article 3 (a so-called 'serious doubts' letter). In that case, the NRA cannot adopt the measure, and a further two month assessment period may commence, if the NRA does not withdraw the draft measure.

- 1.6 On 19 July 2021 the EC issued a comments letter in which it raised serious doubts with respect to ComReg's Draft Decision as set out in the Article 32 Notification (**'Serious Doubts Comments Letter'**). The EC also issued a press release⁴ regarding its Serious Doubts Comments Letter.
- 1.7 On 20 July 2021, ComReg issued an information notice (ComReg Document 21/76)⁵ concerning the EC's Serious Doubts Comments Letter noting the next steps to be followed in accordance with the requirements of Article 32 of the EECC. The next step in the timeline was for BEREC to adopt and publish an opinion on the EC's Serious Doubts Comments Letter indicating whether or not it considered the EC's serious doubts are justified.
- 1.8 On 17 August 2021 BEREC adopted, published and sent to the EC, its opinion (BEREC document BOR (21) 109)⁶ (the **'BEREC Opinion'**). The overall conclusions set out in the BEREC Opinion were that:

"...BEREC considers that the Commission's serious doubts regarding the finding of a market for RFTS and FACO are not justified. Furthermore, BEREC finds the serious doubts regarding the three criteria test and most of the SMP assessment not justified. However, BEREC finds that the Commission's serious doubts as to the substantiation of the geographic market analysis and the lack of a forward-looking perspective are justified. Even though BEREC cannot conclude that this substantiation would lead to a different outcome regarding the geographic market definition and ultimately the outcome of the market analysis.

⁴ See <https://digital-strategy.ec.europa.eu/en/news/commission-opens-depth-investigation-irish-markets-fixed-voice-telephony>.

⁵ Information Notice, Market Review Update, ComReg Document 21/75, available at <https://www.comreg.ie/publication-download/market-review-update-rfts-and-faco>.

⁶ See https://bereg.europa.eu/eng/document_register/subject_matter/bereg/opinions/10019-bereg-opinion-on-phase-ii-investigation-pursuant-to-article-32-of-directive-eu-20181972-cases-ie20212332-2333-market-for-access-to-the-public-telephone-network-at-a-fixed-location-for-residential-and-non-residential-customers-m12007-in-ireland-market-for-call-origination-on-the-public-telephone-network-provided-at-a-fixed-location-m22007-in-ireland.

Therefore, BEREC's overall conclusion is that the Commission's serious doubts regarding the draft decision of the Irish national regulatory authority, ComReg, as expressed in the Commission's letter, dated 16 July 2021, are partially justified."

- 1.9 On 18 August 2021, ComReg issued an information notice (ComReg Document 21/784⁷) concerning the BEREC Opinion, noting that the next step was for the EC, in accordance with the requirements of Article 32 (6) of the EECC, and having taken utmost account of BEREC's opinion:
- (a) To take a decision requiring ComReg to withdraw the draft measure; or
 - (b) To take a decision to lift its serious doubts.
- 1.10 On 20 September 2021 the EC issued a decision in which it has required ComReg to withdraw its Draft Decision as set out in the Article 32 Notification and to re-notify a draft decision, having regard to the EC's present decision ('**Withdrawal Decision**'). The EC also issued a press release⁸ regarding its Withdrawal Decision, with the Withdrawal Decision itself expected to be published by the EC over the coming days.
- 1.11 In accordance with Article 32(7) of the EECC, ComReg is required to amend or withdraw the Draft Decision set out in the Article 32 Notification. Where the Draft Decision as set out in the Article 32 Notification is amended, ComReg is required to undertake a public consultation in accordance with Article 23 of the EECC, and to notify the amended draft measure to the EC in accordance with Article 32(3).

1.2 Next Steps

- 1.12 ComReg notes the EC's Withdrawal Decision and, having considered its content and implications, will provide a further update in due course, as appropriate.
- 1.13 As ComReg has not yet adopted an updated decision with respect to its analysis of the RFTS and FACO markets, both the 2014 RFTS Decision⁹ and 2015 FACO Decision¹⁰ remain in full effect.

⁷ Information Notice, Market Review Update, ComReg Document 21/84, available at <https://www.comreg.ie/publication-download/market-review-further-update-retail-fixed-telephony-services-and-wholesale-fixed-access-and-call-origination>.

⁸ See : <https://digital-strategy.ec.europa.eu/en/news/commission-blocks-proposed-irish-regulation-fixed-voice-telephony>.

⁹ ComReg 14/89, Decision D12/14, Market Review, Retail Access to the Public Telephone Network at a Fixed Location for Residential and Non-Residential Customers.

¹⁰ ComReg 15/82, Decision D05/15, Market Review, Wholesale Fixed Voice Call Origination and Transit Markets.